

Overruling Roe v. Wade?

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New light on an old question

Following President Trump's appointment of Justices Gorsuch and Kavanaugh the question has arisen as to whether, in the coming years, the U.S. Supreme Court will overrule its seminal judgment in [Roe v. Wade \(1973\)](#). *Roe* established a woman's fundamental right to choose to have an abortion before the viability of the fetus. The idea that a conservative majority in the Supreme Court might reverse *Roe* is hardly new. In his concurrence in [Planned Parenthood v. Casey \(1992\)](#), for example, Justice Blackmun – the Justice who wrote *Roe* – worried about the possibility and warned against it: “I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.” The question of *Roe*'s destiny appears more pressing today than ever before because reversing the case has formed part of President Trump's successful political platform. [In October, 2016](#), when asked whether he wanted the Supreme Court to overturn *Roe*, soon-to-be President Trump answered: “If we put another two or perhaps three justices on, that is really what will happen. That will happen automatically in my opinion. Because I am putting pro-life justices on the court.” Has the President kept his promise?

In 1973, *Roe* stated the principle that the right to privacy “is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.” Yet this right “is not unqualified and must be considered against important state interests in regulation.” In particular, a state may assert an interest in protecting potential life, but only at a certain point during pregnancy does this interest become “compelling”, thereby allowing a state to proscribe abortion. This point coincides with the viability of the fetus, i.e. the ability of the fetus to survive outside the mother's womb, which, at the time *Roe* was decided, was generally considered to occur at 28 weeks of pregnancy but is now placed approximately at 24 weeks. To sum it up, *Roe* recognized “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State”.

Subsequent judgments redefined the criteria to assess the constitutionality of the state's intervention without questioning *Roe*'s core holding: the fundamental right to have a pre-viability abortion. In particular, in *Casey* (1992), a plurality opinion developed the “undue burden” test, ruling that a state regulation is unconstitutional when it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”. The “undue burden” test still governs the review of abortion laws, although in [Whole Woman's Health v. Hellerstedt \(2016\)](#), the Court refined it toward a proper balancing test, requiring courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer”.

In contrast to the law in question in *Casey* and in *Whole Woman's Health*, recent abortion laws directly challenge *Roe*'s essential holding and will therefore offer the Supreme Court the opportunity to review – and potentially overrule – the fundamental right to have a pre-viability abortion.

State-driven strategic litigation

In early 2019, emboldened by Trump's victory and by the new appointments to the Supreme Court, several states have passed restrictive laws which forbid abortion well before viability. For example, Utah and Arkansas passed laws prohibiting abortion after 18 weeks of pregnancy, while a group of other states, including Georgia, Kentucky, Louisiana, Mississippi, Missouri, and Ohio, passed so-called "heartbeat-laws" prohibiting abortion as soon as the heartbeat of the fetus can be detected, i.e. approximately from the 6th week of pregnancy. Alabama passed the most restrictive abortion law, punishing doctors who perform abortion without even providing for exceptions in case of rape or incest.

All of these laws, none of which has been enforced, share the same goal. As Eric Johnston – a pro-life attorney who drafted the Alabama bill – explained, they are meant to be a "vehicle" to get the Supreme Court to revisit *Roe*. In an [interview with NPR](#) on Alabama's effective ban on abortion, he made it clear that he expects "it to be holdings of unconstitutionality in the trial court and in the appellate court" and is hopeful that "the Supreme Court will agree to review the case at that point". Admittedly, these laws are not all the same: while the Alabama and heartbeat laws provide for a total or near-total ban on abortion, the Utah and Arkansas laws allow abortion within a time-frame which is similar to the legislation in force in some Western European countries. Yet, the laws are equally incompatible with the viability criterion set in *Roe*.

This 2019 wave of abortion legislation therefore amounts to a state-based campaign of strategic litigation, the overt goal of which is to overrule *Roe*. How will the Supreme Court respond to this challenge? As Danish scientist Niels Bohr wisely warned, "prediction is very difficult, especially about the future". Still, a look at the current composition of the Court as well as its decisions on recent cases might give some hints on its possible approach.

The composition of the Supreme Court

On paper, we cannot rule out the possibility of a majority willing to overrule *Roe*. Leaving the four "liberal" justices aside, Justice Thomas is the one who most clearly and consistently spelled out his disagreement with the Supreme Court's abortion jurisprudence. For example, in [Gonzales v. Carhart \(2007\)](#), he wrote separately "to reiterate [his] view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution".

Recently appointed Justice Kavanaugh only heard [one case](#) on abortion as a judge of the U.S. Court of Appeals for the D.C. Circuit. Interestingly enough, on

this occasion, in a dissenting opinion, he stressed that “some disagree with cases holding that the U.S. Constitution provides a right to an abortion” but “*as a lower court*, our job is to follow the law as it is, not as we might wish it to be”. How will he act now that his job is no longer to follow the law as it is, but to say what the law is?

As Justices Alito and Gorsuch are generally considered opponents to abortion, the biggest question mark concerns Chief Justice Roberts. While he is known as a conservative, [his capacity as Chief Justice](#) might lead him to avoid overruling an established precedent, despite personal disagreement, to bolster the legitimacy and authority of the Court. After all, the concern that overruling *Roe*’s central holding “would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law”, was one of the main arguments in *Casey* to reaffirm *Roe*. That’s why it is worth having a brief look at the most recent attitude of the Supreme Court with respect to *stare decisis*.

Ready to overrule?

On 13 May 2019, the Court in [Franchise Tax Board of California v. Hyatt \(2019\)](#) held that the Constitution requires states to grant immunity to other states in their own courts, overruling [Nevada v. Hall](#), a 40-year-old precedent allowing states to decide whether or not to grant such immunity. The issue itself is not a major one and definitely does not have anything to do with termination of pregnancy. What is remarkable, however, is how little attention the judgment pays to *stare decisis*. Not only did the Court overrule an established precedent with a strict 5 to 4 majority, but the opinion of the Court delivered by Justice Thomas devotes no more than one page to counter the respondent’s defense of *Hyatt* on the basis of *stare decisis*. Moreover, the opinion also does not engage with the criteria the Court developed in *Casey* “to test the consistency of overruling a prior decision with the ideal of the rule of law”. If this decision bears any [relevance to the dispute over Roe](#), it is to show that the current conservative majority is ready to overrule previous opinions for the simple reason that it considers them wrongly decided.

This attracted the criticism of the dissenting opinion authored by Justice Breyer and joined by the three other “liberals.” Recalling *Casey*, the dissenters blame the majority for surrendering to the temptation to overrule a decision “only because five Members of a later Court come to agree with the earlier dissenter” and even thought the overruled opinion “is a well-reasoned decision that has caused no serious practical problems in the four decades since we decided it”. The dissent concludes with a not too veiled allusion to *Roe*: “Today’s decision can only cause one to wonder which cases the Court will overrule next.”

Overruling without overruling?

Before the abovementioned 2019 laws reach the Supreme Court, the justices are likely to be confronted with [other abortion laws of 2016-2017](#) that regulate access to abortion in a stricter way without frontally challenging the right to a pre-viability abortion. Restrictions range from forbidding the “dilation and evacuation” abortion

procedure to requiring doctors to show the woman an ultrasound before abortion, from prohibiting selective abortion (i.e. abortions sought solely on the basis of the sex, race or disability of the fetus) to increasing the waiting time before an abortion can take place, from requiring doctors performing abortions to have admitting privileges at a nearby hospital to stricter regulations on parental consent and judicial bypass for minors seeking abortion. Upholding these laws would not necessarily require an overruling of *Roe* for they are to be examined in light of the “undue burden test”. But they might provide the Court with a different path – eroding the right instead of directly challenging it – to limit *de facto* the right to have an abortion without a formal overruling of *Roe*’s core holding. A loose application of the “undue burden” test might indeed allow states to impose highly discouraging requirements both to women seeking abortions and to abortion providers to the extent that while remaining a right on paper, abortion would in practice be extremely difficult to obtain.

Some of these cases already have reached the Supreme Court, and one might find hints that the Supreme Court (or some Justices on the bench) might be willing to follow this path. A Louisiana law requiring doctors performing abortions to have admitting privileges at a nearby hospital was upheld by the Fifth Circuit Court, despite the fact that its content is very similar to the Texas law that was struck down by the Supreme Court in *Whole Woman’s Health*. On 7 February 2019 the Supreme Court [granted a stay](#) pending the decision on whether to review the case on the merits. The stay was granted through a strict 5 to 4 majority where the Chief Justice joined the “liberals” in preventing the law from being enforced. Still the dissent by Justice Kavanaugh hints at a potential loosening of the undue burden test. The Justice only considers the factual question of whether the affected doctors will be able to obtain admitting privileges but does not question whether this requirement provides any benefit that could justify the burden it imposes, a test that played a major role in *Whole Woman’s Health*.

Most recently, in [Box v. Planned Parenthood of Indiana and Kentucky](#), the Supreme Court was confronted with two issues raised by an Indiana law. On the one hand, the Court upheld under the “rational basis test” a provision requiring a woman seeking an abortion to decide how to dispose of the fetal remains; however, the Court did not exclude future unconstitutionality under the more demanding “undue burden test”. On the other hand, the Court decided to deny *certiorari* with respect to a provision forbidding sex-, race-, and disability-selective abortions. As just one Circuit Court has thus far ruled on this kind of law, the Court decided to address it at a later stage after further percolation of the issue in other courts. As a whole, the decision testifies to a cautious approach of the Court, which appears to be unwilling to address abortion laws now. This impression is confirmed by the Court’s [most recent decision to deny certiorari in a case concerning a 2016 Alabama law](#) prohibiting dilation and evacuation abortions that was struck down by a circuit court. Thomas’ concurrence in *Box*, however, seems to seize upon the occasion to set the scene for when the Court will decide the merit of the question. While most of his opinion is devoted to drawing a strong link between abortion and eugenics, the last part argues that “whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions”. As *Roe* secures the right to have a pre-viability abortion regardless of the reasons, and *Casey* affirmed *Roe*’s core holding,

one might think that a ban on selective pre-viability abortions is unconstitutional in light of *Roe* and *Casey*. What Thomas suggests, by contrast, is that *Casey* did not address the question of selective abortions, so that an exception for selective abortions might be carved out in *Roe* and *Casey* without overruling them.

Politicization of constitutional law?

No matter *how close* *Roe*'s overruling may be – which no one can predict now – the picture drawn in this post suggests that an overruling has *never been so close* before. Time will tell whether (and how) the Court will overrule *Roe*, but the current developments already invite us, regardless of any future Supreme Court decision, to reflect on the dynamics and weaknesses of judge-made rights, i.e. rights extracted from general constitutional clauses via judicial interpretation. No provision in the federal Constitution or in a federal law expressly guarantees the right of a woman to have an abortion. As the Supreme Court in 1973 recognized it in more generous terms than the contemporaneous European legislators, roughly fifty years later the “same” Court might qualify or even revoke it. If we combine this observation with the extremely politically charged process of Justices' appointment – remember Trump's quote at the beginning of this text – one might ask whether we are confronted with a massive politicization of constitutional law and rights. After all, it is not an exaggeration to say that the meaning of the Constitution and the rights it protects depend largely on who wins the election. Does this amount to a facial repudiation of the very idea of the Constitution as something that “[withdraw\[s\] certain subjects from the vicissitudes of political controversy](#), to place them beyond the reach of majorities and officials and [...] establish them as legal principles to be applied by the courts”?

To be sure, constitutional law is never fully insulated from political developments. In Europe, not only Constitutions can be amended – with due cautions – through the political process, but also constitutional courts' judges are, at least in part, chosen by the Parliament. This is meant to increase their legitimacy and to secure that, in the long run, the constitutional court stays tuned with the political developments. However, in the U.S., judicial appointment procedure that does not necessarily foster compromise among the parties, combined with the randomness of vacancies at the Supreme Court seems to have brought about the politicization of constitutional adjudication to an extent and a degree that is unknown on the other side of the Atlantic.

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